

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-171

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION



This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on August 19, 2004, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated May 5, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by upgrading his discharge (general, under honorable conditions) to honorable. The applicant argued that his discharge should be upgraded because "to the best of my knowledge, [there] is no reason not to change."

SUMMARY OF THE APPLICANT'S RECORD

The applicant enlisted in the Coast Guard on December 12, 1960, at the age of eighteen. On April 29, 1963, the applicant was admitted to a Public Health Service hospital where he underwent a physical and psychiatric evaluation, prompted by his father's allegations that his son was having difficulties with social adjustment. The physician who performed the initial clinical evaluation diagnosed the applicant with an immature personality. In addition, the physician noted that the applicant was "mentally responsible ... to distinguish right from wrong ...," and that this condition was "neither incurred while [on] or aggravated by any period of active duty in the U.S.

Coast Guard.” Despite having found no disqualifying mental or physical defects ratable as a disability, the physician nonetheless indicated in his report that “This individual does not meet the minimum standards as set forth in ... the Coast Guard Medical Manual.” The physician recommended that the applicant be discharged from the Coast Guard.

On April 30, 1963, the applicant was evaluated in the hospital by a psychiatrist with the Public Health Service. Following this evaluation, the psychiatrist diagnosed the applicant as having a “Character disorder – passive – aggressive type” and recommended that he be discharged from the Coast Guard. The applicant was discharged from the hospital and returned to duty.

On May 17, 1963, the applicant sent a letter to his commanding officer (CO) in which he acknowledged that he had been recommended for discharge for unsuitability, had been advised that he could make a statement, and that he did not desire to make a statement.

On May 21, 1963, the applicant’s CO issued a memorandum to the Commandant in which he recommended that the applicant be discharged “from the service by reason of unsuitability because of character and behavior disorders.” The CO noted that his decision was premised on the recommendations of the two physicians who evaluated the applicant during his hospitalization.

At some point in May 1963, the Intelligence and Law Enforcement Branch was asked to conduct an investigation into the applicant’s character and behavior disorders.

On May 31, 1963, the Commandant issued a letter to the applicant’s CO in which he disapproved the recommendation of discharge contained in the CO’s letter of May 21, 1963. The Commandant stated that there is “insufficient evidence that this case fits any of the categories for unsuitability as outlined in Article 12.B.10. of the Personnel Manual.”

Sometime in early July 1963, the applicant admitted to his CO that he had homosexual tendencies. As a result of the admission, the applicant was transferred off of his ship and onto a Coast Guard base for an investigation under Article 12.B.10. of the Personnel Manual.¹ On July 11, 1963, the applicant’s CO noted in a letter to the Commandant that the “applicant made a verbal admission to his Commanding Officer regarding his homosexual tendencies” Shortly thereafter, on July 16, 1963, the CO issued a memorandum to the applicant and once again stated that he was recommending that the applicant be discharged from the Coast Guard. The CO stated

¹ Article 12.B.10. of the Personnel Manual (at the time of the applicant’s discharge) stated that “... [p]rior to recommending the discharge of an individual for unsuitability, the commanding officer shall thoroughly investigate the case... .”

in his memorandum that his decision to discharge the applicant was “due to receipt of official Coast Guard Intelligence information which indicated a classification in your case as outlined in reference (a) (Class II Homosexual).”

On July 17, 1963, the applicant signed a statement wherein he waived his right to a hearing before an investigatory body. The statement also contained affirmations that the applicant understood that the Commandant would determine and specify the type of discharge he would receive, and that he fully understood the ramifications of receiving a discharge under other than honorable conditions.

On July 18, 1963, the applicant’s CO issued a letter to the Commandant recommending that the applicant be discharged from the Coast Guard because an investigation determined that the applicant was a Class II homosexual.² The CO asked that the Commandant consider giving the applicant an honorable discharge, because the applicant had no “military offenses or civil charges during his enlistment.”

On July 24, 1963, the Commandant directed that the applicant be discharged from the Coast Guard pursuant to Article 12.B.12. of the Personnel Manual. He indicated that the applicant should receive a “general discharge by reason of unfitness.”

The applicant was discharged on August 2, 1963. The applicant’s DD Form 214 indicates that he was discharged under honorable conditions, pursuant to Article 12.B.12. of the Personnel Manual. The record indicates that during the applicant’s two years of service, he received an average proficiency score of 3.72 and an average conduct score of 3.98 out of 4.0.

VIEWS OF THE COAST GUARD

On January 10, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board deny the applicant’s request. The JAG recommended that the Board deny relief because the application was untimely and it is not in the interest of justice to waive the statutory three-year filing deadline. Moreover, the JAG stated that if the Board excuses the applicant’s failure to timely file his application, then relief should be denied because the applicant failed to support his claim that the Coast Guard erred in discharging him with a general discharge under honorable conditions.

In its memorandum to the JAG, CGPC recommended that the applicant’s request should be denied because no error was committed at the time of the applicant’s

² Class II homosexuals were those members who, while on active duty, engaged in one or more homosexual acts not within the purview of Class I. Article 12.B.12.d.6. of the Personnel Manual.

discharge. CGPC noted that the applicant made a verbal admission to his CO of his homosexual tendencies, an investigation was conducted in accordance with 12.B.10. of the Personnel Manual, and the applicant was discharged forthwith in accordance with the Coast Guard policy in effect at that time.

The JAG stated that when considering the applicant's case under the Equity Standard of Review set forth in 33 C.F.R. Chapter 1 § 51.7, it is clear that the policies governing discharge for homosexuality have changed substantially since the applicant's discharge. However, CGPC noted that under the Coast Guard's current policy of "don't ask, don't tell", a member "may be discharged for homosexuality based on evidence and/or statement(s) that demonstrates the member has a propensity or intent to engage in homosexual acts. And as a result, that member may receive a General discharge Under Honorable Conditions." CGPC noted that the applicant freely admitted to having homosexual tendencies, and this voluntary admission to his CO clearly meets the criteria of a statement that demonstrates a propensity or intent to engage in homosexual acts. Accordingly, CGPC noted, under current Coast Guard policy, the applicant would have received the same type of discharge that he received upon his discharge in 1963.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 12, 2005, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

Article 12.B.12 (Unfitness) of the Coast Guard Personnel Manual (at the time of the applicant's discharge) provided that an enlisted person could be separated by reason of unfitness, with an undesirable discharge, and that all cases of homosexuality should be processed as set forth in paragraph (d) of 12.B.12.³

Article 12.B.12.d.6. of the Personnel Manual provided a classification for defining three classes of homosexual conduct:

- a. **Class I** is defined as those cases where accompanied by assault or coercion as characterized by an act in or to which the other person involved did not willingly cooperate or consent, or for which the consent was obtained through force, fraud, or actual intimidation, thereby constituting invasion of the rights of another, or any homosexual action with a child under the age of 16 years without regard to whether the child cooperated un or consented to such an act.

³ Paragraph (d) of 12.B.12. contains a protracted description of the Coast Guard's policy and the administrative procedures for the disposition of personnel in cases involving homosexual tendencies or acts.

b. **Class II** is defined as those cases where an enlisted member, while on active duty in the Coast Guard, has engaged in one or more homosexual acts not within the purview of Class I. Class II also includes all cases falling within Class I in which it is determined not to prefer charges, or, if charges are preferred, not to refer them to a court-martial for trial, or such cases where trial is held but does not result in a punitive discharge.

c. **Class III** is defined as those cases where an enlisted member:

(1) Exhibits, professes or admits to homosexual tendencies, or habitually associates with persons known to be homosexuals, but there is no evidence that he has, while on active duty in the Coast Guard, engaged in one or more homosexual acts, or has proposed or attempted to perform an act of homosexuality.

(2) Prior to entering the Coast Guard, exhibited, or admitted to homosexual tendencies, or habitually associated with persons known to be homosexuals, or who engaged in one or more homosexual acts, or proposed or attempted to perform an act of homosexuality, but there is no evidence that he has, while on active duty in the Coast Guard, engaged in or proposed or attempted to perform an act of homosexuality.

Article 12.B.12.d.1.c. stated that before a member could be discharged for homosexuality, "care must be exercised that all persons involved are completely investigated and reported and that appropriate information is expeditiously forwarded to other commands as necessary to complete all cases."

Article 12.B.3. stated that an honorable discharge could be issued for members discharged for unfitness, provided that member achieved a minimum final average of 2.7 in proficiency and 3.25 in conduct.

Article 12.B.2.f. of the Personnel Manual (current) states that a member's commanding officer or higher authority can effect a separation with an honorable discharge if the member is eligible for or subject to discharge and the member merits an honorable discharge under prescribed standards. A discharge due to unfitness is listed as warranting an honorable discharge. The type of discharge will also depend upon the member's military behavior and proficient performance of duty with due consideration for the member's age, length of service, grade, and general aptitude. Through 30 June 1983, the member must have made a minimum final average of 2.7 in proficiency and 3.0 in conduct.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error in his record. 10 U.S.C. § 1552. The applicant signed and received his discharge documents in 1963, indicating that he was receiving a discharge under honorable conditions for unfitness. However, the Board finds that the applicant knew or should have known the type of discharge he received when he signed his DD 214. Thus, his application was untimely.

3. Pursuant to 10 U.S.C. § 1552, the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. To determine whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reason for the delay and conduct a cursory review of the merits of the case. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992). The applicant did not provide a reason why he waited more than 40 years to request that his discharge be upgraded. On his application to the BCMR, the applicant merely noted that the Board should consider his application because "it is the right thing to do." However, a cursory review of the merits of this case indicates that the type of discharge received by the applicant was unjust. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

4. The record indicates that following the applicant's verbal admission of his homosexual propensities, the Coast Guard conducted an investigation pursuant to Article 12.B.12.d.1.c., which requires that an investigation be conducted before a member is discharged for homosexuality. Although the record does not contain the findings of that investigation, the Board presumes that the investigation uncovered evidence that supported the applicant's admission that he had homosexual propensities. The Board makes this presumption because the record contains a memorandum to the applicant from his CO, indicating that the Coast Guard had completed its investigation into the applicant's admissions and determined that he should be classified as a Class II homosexual.⁴ Moreover, the Board is further persuaded that the Coast Guard conducted the investigation because the record contains a memorandum from the Commandant directing that in light of the information obtained in the investigation, the applicant should be discharged for unfitness.

5. The Board finds that the Coast Guard committed an error at the time of the applicant's discharge in 1963. Article 12.B.2.f. of the Personnel Manual stated that members discharged for unfitness should receive an honorable discharge if warranted by that member's military behavior, proficiency in his duties, and his personal conduct. The applicant's CO noted in his recommendation for discharge that the applicant's

⁴ The Board notes that notwithstanding any evidence gathered during the Coast Guard's investigation, he could have been classified as a Class III homosexual. However, that difference in classification would not affect the outcome of this case.

“performance of duty and character of service indicates that favorable consideration should be given to an honorable type of discharge. He has no military offenses or civil charges in his enlistment.” Moreover, the record also indicates that during the applicant’s two years of service, he received an average proficiency score of 3.72 and an average conduct score of 3.98 on a scale of 4.0. Article 12.B.3. stated that an honorable discharge could be issued for members discharged for unfitness, provided that member achieved a minimum final average of 2.7 in proficiency and 3.25 in conduct. Therefore, an honorable discharge was warranted by the applicant’s military behavior and his high marks for duty and conduct.

6. The Board finds that the applicant would have received an honorable discharge under current Coast Guard policy. Article 12.E.4.1. of the current Personnel Manual states that discharges for homosexual conduct “shall be characterized as Honorable or General (under Honorable Conditions) if the sole basis for separation is homosexual conduct unless aggravating circumstances are included in the findings.” In this case, the applicant’s admission to his CO that he had homosexual propensities was the sole basis for his discharge, and the record is bereft of any aggravating circumstances. Moreover, although factor marks were not in use by the Coast Guard when the applicant was discharged, Article 12.B.2.f. of the current Personnel Manual states that members discharged prior to June 30, 1983, with minimum final average marks of 2.7 in proficiency and 3.0 in conduct are eligible for honorable discharge. The applicant’s final averages greatly exceeded these minimum standards.

7. In light of the absence of any aggravating circumstances, the applicant’s high marks in performance and conduct, and his CO’s recommendation that he be given an honorable discharge, the Board finds that the Coast Guard committed an error at the time of the applicant’s discharge. Furthermore, the applicant would be eligible for an honorable discharge under current Coast Guard policy. Accordingly, the applicant’s discharge should be corrected to “honorable.”

8. Accordingly, the applicant’s request should be granted.

ORDER

The application of former XXXXXXXXXXXXXXXXXXXXXXXX, USCG, for the correction of his military record is granted. The applicant's DD 214 shall be corrected to show that he received an honorable discharge.

